

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ERLING OLMERO LOPEZ POLANCO,

Case No. 2:15-CV-1234 JCM (VCF)

**Plaintiff(s),**

## ORDER

V.

LORETTA E. LYNCH, et al.,

Defendant(s).

Presently before the court is plaintiff Erling Olmero Lopez-Polanco's motion for summary judgment (ECF No. 17). Defendants Loretta E. Lynch, Jeh Johnson, Leon Rodriguez, Ron Rosenberg, and Laura B. Zuchowski's filed a response and cross-motion for summary judgment (ECF Nos. 21, 23). Plaintiff filed a response to defendants' cross-motion (ECF No. 24), and defendants filed a reply. (ECF No. 25).

## I. Background

The present case arises from plaintiff’s attempt to establish nonimmigrant status through United States Citizenship and Immigration Services (“USCIS”). Plaintiff, a native and citizen of Guatemala, entered the United States without inspection sometime between 2004 and 2006. (ECF No. 14-1 at 374, 378, 666). On February 22, 2012, the Department of Homeland Security initiated removal proceedings against plaintiff at the Las Vegas Immigration Court. (*Id.* at 666). The immigration court stayed the proceedings in order to allow plaintiff to adjudicate a Form I-918 petition with USCIS. (*Id.* at 162).

Plaintiff submitted a Form I-918 petition seeking “U” nonimmigrant status, commonly known as a U-Visa, under 8 U.S.C. § 1101(a)(15)(U). (*Id.* at 374). In order to meet the requirements set forth by section 1101(a)(15)(U), plaintiff submitted a Supplement B form that

1 Lieutenant James Weiskopf certified in support of his petition. (*Id.* at 403–05). The supplement  
 2 indicated that on July 19, 2011, plaintiff was a victim of burglary and robbery, suffered from  
 3 mental anguish and instability as a result of the crime, and is being or is likely to be helpful to  
 4 officials. (*Id.* at 403–04). The supplement also includes a brief account of the events on July 19,  
 5 2011, which corroborate the official police narrative. (*Id.* at 405).

6 According to the police narrative, which the parties do not dispute, the events on July 19,  
 7 2011, took place at plaintiff’s apartment at 7:00 in the morning. (*Id.* at 384). Jose Guzman came  
 8 in from the front door, hit plaintiff in the head and back, and knocked plaintiff to the ground. (*Id.*).  
 9 Guzman subsequently took plaintiff’s wallet, stole a debit card, and threw the wallet back at  
 10 plaintiff. (*Id.*). While leaving Guzman stated, “I will be back to kill you.” (*Id.*). The case report  
 11 identifies a knife as Guzman’s primary means of attack and describes the suspected action against  
 12 plaintiff as “cut/stabbed,” “forced entry,” and “hit/assaulted during act.” (*Id.* at 450, 454). The  
 13 report also indicated that the criminal activity included domestic violence because Guzman is a  
 14 “relative by marriage.” (*Id.* at 454).

15 The USCIS issued a notice instructing plaintiff to submit further evidence in support of his  
 16 petition because the crimes indicated on the Supplement B form were not sufficient to establish  
 17 nonimmigrant status. (*Id.* at 390–91). In response, plaintiff submitted a second Supplement B form  
 18 that Lieutenant Weiskopf certified, indicating that plaintiff was also a victim of felonious assault.  
 19 (*Id.* at 395).

20 On March 11, 2014, the USCIS denied plaintiff’s petition on the grounds that he failed to  
 21 establish that he was the victim of a qualifying criminal activity. (*Id.* at 371). The agency explained  
 22 that the Supplement B form did not include crimes that are specifically listed in 8 U.S.C. §  
 23 1101(a)(15)(U)(iii) or criminal activities that are similar to those crimes. (*Id.* at 370).

24 On November 20, 2014, plaintiff filed an appeal of USCIS’s decision with USCIS’s  
 25 Administrative Appeals Office (“AAO”). (*Id.* at 152, 203). Plaintiff argued that the USCIS failed  
 26 to consider whether he was a victim of felonious assault, an offense enumerate in section  
 27 1101(a)(15)(U)(iii), and that the agency had made a mistake in its domestic violence analysis. (*Id.*  
 28 at 207–09). The AAO, in a non-precedential decision, affirmed USCIS’s decision. (*Id.* at 144,

1       150). The AAO held that invasion of the home (burglary) and robbery are not similar enough to a  
 2 qualified crime enumerated in 8 U.S.C. § 1101(a)(15)(U)(iii), specifically felonious assault. (*Id.*  
 3 at 149). The AAO further held that plaintiff was not a victim of domestic violence because he did  
 4 not establish a familial relationship with Guzman or indicate that Guzman was a member of his  
 5 household during or before the assault. (*Id.* at 150).

6              On June 30, 2015, plaintiff filed a complaint to this court challenging the AAO's denial of  
 7 his Form I-918 petition. (ECF No. 1).

8       **II. Legal Standard**

9        *a. Summary Judgment*

10          The Federal Rules of Civil Procedure provide for summary adjudication when the  
 11 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
 12 affidavits, if any, show that "there is no genuine issue as to any material fact and that the movant  
 13 is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary  
 14 judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477  
 15 U.S. 317, 323–24 (1986).

16          In determining summary judgment, a court applies a burden-shifting analysis. "When the  
 17 party moving for summary judgment would bear the burden of proof at trial, it must come forward  
 18 with evidence which would entitle it to a directed verdict if the evidence went uncontested at  
 19 trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine  
 20 issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

22          In contrast, when the nonmoving party bears the burden of proving the claim or defense,  
 23 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
 24 element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed  
 25 to make a showing sufficient to establish an element essential to that party's case on which that  
 26 party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–24. If the moving  
 27 party fails to meet its initial burden, summary judgment must be denied and the court need not  
 28

1 consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60  
 2 (1970).

3 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
 4 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
 5 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing  
 6 party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
 7 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions  
 8 of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th  
 9 Cir. 1987).

10 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
 11 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,  
 12 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
 13 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
 14 for trial. *See Celotex Corp.*, 477 U.S. at 324.

15 At summary judgment, a court’s function is not to weight the evidence and determine the  
 16 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*  
 17 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all justifiable  
 18 inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is  
 19 merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at  
 20 249–50.

21       ***b. Review of Administrative Judgment***

22 Under 5 U.S.C. § 706 of the Administrative Procedure Act (“APA”), a court may set aside  
 23 any agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in  
 24 accordance with law. 5 U.S.C. § 706(2)(A). *See Young China Daily v. Chappell*, 742 F. Supp. 552,  
 25 554–55 (N.D. Cal. 1989) (finding an abuse of discretion where agency relied on irrelevant factors  
 26 and failed to consider relevant factors in denying a petition). As the Ninth Circuit has explained, a  
 27 district court’s review of an administrative action must be made on the basis of the administrative  
 28 record. *Tongatapu Woodcraft Hawaii Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984). An

1 agency's decision is arbitrary and capricious if it "offered an explanation for its decision that ran  
 2 counter to the evidence before the agency." *Sw. Ctr. for Biological Diversity v. U.S. Forest*  
 3 *Serv.*, 100 F.3d 1443, 1448 (9th Cir. 1996) (brackets omitted).

4 In *Chevron* the Supreme Court established a two-pronged framework for judicial review  
 5 of an administrative agency's interpretation of the statutes and regulations that it administers:

6 If congressional intent is clear, both the court and the agency must  
 7 give effect to the unambiguously expressed intent of Congress. If,  
 8 however, Congress has not directly addressed the exact issue in  
 question, a reviewing court must defer to the agency's construction  
 of the statute so long as it is reasonable.

9 *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011–12 (9th Cir. 2006) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (internal quotation marks and citations omitted)).

12 However, in *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001), the Supreme  
 13 Court held that *Chevron* deference applies only "when it appears that Congress delegated authority  
 14 to the agency generally to make rules carrying the force of law, and that the agency interpretation  
 15 claiming deference was promulgated in the exercise of that authority." The Ninth Circuit has  
 16 interpreted *Mead* as placing "crucial limits on *Chevron*-deference owed to administrative practice  
 17 in applying a statute, clarifying that agency interpretations promulgated in a non-precedential  
 18 manner are beyond the *Chevron* pale." *Garcia-Quintero*, 455 F.3d at 1012 (internal quotation  
 19 marks omitted); *see also Hall v. EPA*, 273 F.3d 1146, 1156 (9th Cir. 2001) ("Interpretations of the  
 20 Act set forth in non-precedential documents are not entitled to *Chevron* deference."). "In light  
 21 of *Mead*, the essential factor in determining whether an agency action warrants *Chevron* deference  
 22 is its precedential value." *Garcia-Quintero*, 455 F.3d at 1012 (internal quotation marks omitted).

23 Here, the AAO states that it has delivered a "non-precedent decision." (ECF No. 14-1 at  
 24 144). Accordingly, the court will not apply *Chevron* deference. Nevertheless, under the section  
 25 706(2)(A) standard, a court may not "substitute its judgment for that of the agency." *Northwest*  
*26 Motorcycle Assoc. v. U.S. Dept. Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). Instead, a court  
 27 "must consider whether the decision was based on a consideration of the relevant factors and  
 28

1 whether there has been a clear error of judgment.’ ” *Id.* (citing *Citizens to Preserve Overton Park*  
 2 *v. Volpe*, 401 U.S. 402, 416 (1971)).

### 3 III. Discussion

4 Plaintiff argues that the AAO erred in affirming the USCIS’s denial of the Form I-918  
 5 petition because the AAO failed to consider whether plaintiff was the victim of felonious assault.  
 6 (ECF No. 17 at 18). Defendants argue that the AAO’s affirmation of the USCIS decision was  
 7 appropriate because the agency’s decision included a *de novo* review of all the materials in the  
 8 petition, including any records that might indicate that plaintiff is a victim of felonious assault.  
 9 (ECF No. 23 at 14).

10 “U” nonimmigrant status pursuant to 8 U.S.C. § 1101(a)(15)(U) is an immigration benefit  
 11 for victims of crimes who have, are, or are likely to assist law enforcement in the investigation or  
 12 prosecution of a crime. The USCIS, before deciding whether a party qualifies for a U-Visa, has an  
 13 obligation to conduct a *de novo* review of all the evidence that the parties submit in connection  
 14 with the Form I-918 petition. 8 C.F.R. 214.14(c)(4).

15 In determining whether a party qualifies for this U-Visa, agencies or courts must conduct  
 16 a two-part test. First, agencies or courts must either find that the party is admissible to the United  
 17 States or waive grounds for inadmissibility. 8 C.F.R. § 214.1(a)(3)(i). Second, agencies and courts  
 18 must find that the party meets the following requirements: (1) the alien has suffered substantial  
 19 physical or mental abuse as a result of having been a victim of qualified criminal activity, (2) the  
 20 alien possesses information concerning the criminal activity, (3) the alien has been helpful, is  
 21 helpful, or is likely to be helpful to officials investigating or prosecuting the criminal activity, and  
 22 (4) the criminal activity violated the law of the United States or occurred in the United States. 8  
 23 U.S.C. § 1101(a)(15)(U)(i)(I)-(IV).

24 A party can be a victim of a qualified criminal activity by being a victim of a crime  
 25 enumerated in 8 U.S.C. § 1101(a)(15)(U)(iii) or by being a victim of any “similar activity.” 8  
 26 U.S.C. § 1101(a)(15)(U)(iii). Section 1101(a)(15)(U)(iii) lists felonious assault and domestic  
 27 violence as qualifying crimes, but does not list burglary or robbery. *See id.* Alternatively, criminal  
 28 activity qualifies as “similar activity” when “the nature and elements of the offenses are

1 substantially similar to the statutorily enumerated list of criminal activities” rather than the facts  
 2 of the crime. 8 C.F.R. § 214.14(a)(9).

3 The AAO held that the elements of burglary and robbery are not substantially similar to  
 4 felonious assault and, therefore, are not qualifying crimes. (ECF No. 14-1 at 148–49). The AAO  
 5 also held that plaintiff was not a victim of domestic violence. (*Id.* at 150). However, the AAO’s  
 6 decision and the administrative record do not indicate that the AAO considered whether plaintiff  
 7 was a victim of felonious assault, which is a qualifying crime. Furthermore, the defendants do not  
 8 bring forth any facts or arguments explaining why the AAO did not specifically address plaintiff’s  
 9 felonious assault argument. Instead, defendants make a conclusory claim that the AAO conducted  
 10 a *de novo* review, which prevents the decision from being “arbitrary, capricious, an abuse of  
 11 discretion, or otherwise not in accordance with law.” *See* 5 U.S.C. § 706(2)(A).

12 The record does not clearly indicate why the AAO did not address whether plaintiff was a  
 13 victim of felonious assault. The court sees two possible explanations. First, the AAO may have  
 14 conducted a review of plaintiff’s felonious assault argument, found that the plaintiff was not a  
 15 victim, and failed to create a record of the analysis in its decision. Second, the AAO may have  
 16 excluded felonious assault from their analysis because it was not an investigated crime. *See* (ECF  
 17 No. 14-1 at 149).

18 The USCIS’s failure to address the felonious assault argument was one of the central  
 19 reasons for plaintiff’s appeal. *See* (ECF No. 14-1 at 207–08). The AAO should have addressed or  
 20 at least acknowledged plaintiff’s argument. Instead, the record before the court contains no  
 21 indication that the AAO, in its supposedly *de novo* review, considered whether plaintiff was a  
 22 victim of felonious assault.

23 The AAO’s failure to address one of plaintiff’s central arguments in its decision or,  
 24 alternatively, failure to assess the felonious assault argument at all constitutes a clear error of  
 25 judgment because by doing so the AAO left out relevant factors in its analysis. *Cf. Young China*  
*Daily*, 742 F. Supp. at 554–55 (finding an abuse of discretion where agency relied on irrelevant  
 26 factors and failed to consider relevant factors in denying a petition); *see Northwest*, 18 F.3d at  
 27 1471. Furthermore, the AAO’s decision offers an explanation that runs counter to the evidence,

1 specifically the felonious assault content in the second Supplement B and case report. *See*  
 2 *generally Sw. Ctr. for Biological Diversity*, 100 F.3d at 1448. Because the USCIS did not strike  
 3 these documents, the AAO cannot ignore them. To do so would be a failure to consider evidence  
 4 before the agency and would constitute a clear error of judgment. *See id.*; *see also Northwest*  
 5 *Motorcycle*, 18 F.3d at 1471.

6 **IV. Conclusion**

7 The court finds that the AAO committed a clear error of judgment when it did not address,  
 8 consider, or give sufficient reason to not consider whether plaintiff was a victim of felonious  
 9 assault. In fact, the decision never even mentions plaintiff's argument. The AAO's decision is non-  
 10 precedential and, therefore, the court can set aside the decision upon finding a clear error of  
 11 judgement. *See Garcia-Quintero*, 455 F.3d at 1012; *see also Hall*, 273 F.3d at 1156; *see also*  
 12 *Northwest Motorcycle*, 18 F.3d at 1471.

13 The AAO is more acquainted with the record and relevant laws than this court, making it  
 14 the appropriate venue for resolving plaintiff's dispute. Therefore, the court vacates the AAO's  
 15 decision and remands this case back to the AAO for an appropriate consideration of plaintiff's  
 16 felonious assault argument.

17 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Erling Olmero  
 18 Lopez-Polanco's motion for summary judgment (ECF No. 17), be, and the same hereby is,  
 19 GRANTED in part and DENIED in part, consistent with the foregoing.

20 IT IS FURTHER ORDERED that defendants Loretta E. Lynch, et.al., cross-motion for  
 21 summary judgment (ECF No. 21), be, and the same hereby is, DENIED.

22 IT IS FURTHER ORDERED that the AAO's judgment be, and the same hereby is,  
 23 VACATED, and the appeal of plaintiff's petition is REMANDED for reconsideration, consistent  
 24 with the foregoing.

25 DATED July 21, 2016.

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UNITED STATES DISTRICT JUDGE  
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